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No. 91-1365

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

MARIA WESLEY,

Petitioner,

v.

THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

and

BISHOP LEONARD REGIONAL CATHOLIC SCHOOL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT BISHOP LEONARD REGIONAL CATHOLIC SCHOOL

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court lack jurisdiction to review the Free Exercise claim raised for the first time by petitioner in Question Number Two of the petition for certiorari?

2. Does permitting a pervasively religious employer to discharge an employee for violating a religious work rule, without charging that employer for unemployment benefits, violate the Establishment Clause of the First Amendment to the United States Constitution?

3. Would requiring the respondent Bishop Leonard Regional Catholic School to pay unemployment benefits when it discharges a teacher who was employed in one of its elementary schools, because she knowingly disobeyed its religiously based work rule, violate respondent's rights under the Free Exercise Clause?

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STATEMENT OF THE CASE

This case involves the denial of unemployment compensation benefits to a teacher who was discharged from a Roman Catholic elementary school for violating its religiously based work rule. That rule required teachers to refrain from publicly rejecting the teachings of the Roman Catholic Church.

Pennsylvania's unemployment compensation law disallows benefits where an employee has been discharged for willful misconduct. As construed by the Pennsylvania courts, the "violation of a known and reasonable [employer] rule establishes willful misconduct." Appendix to Petition for Certiorari ("App.") at A9. The burden is on the employer to "establish the existence of the rule or policy and that the employee was aware of it." *Id.* Although statutorily exempt from mandatory participation in the state unemployment compensation program, Respondent, Bishop Leonard Regional Catholic School ("Bishop Leonard"), participates therein voluntarily.

Bishop Leonard introduced evidence at the administrative hearing which established the existence of a written policy of the School which, as a condition of employment, prohibited its teachers from publicly rejecting the official teachings, doctrine, or laws of the Catholic Church. Father DiNardo (misidentified in the Record as "Donardo"), Chancellor of the Diocese of Pittsburgh, testified as a qualified expert on behalf of Bishop Leonard regarding the Church's official teachings on marriage as a sacrament and on canonical impediments to valid sacramental marriage within the Catholic Church. His unrebutted testimony was that Church teachings require that any prior marriage of a Catholic be canonically annulled before a canonically sanctioned marriage may be entered into by Catholics. Notes of Testimony from hearing, 2/21/90 ("N.T."), at 7.

Petitioner, Ms. Wesley, a teacher at Bishop Leonard who is a baptized Catholic, married a man who was

divorced from a Catholic woman and whose prior marriage had not been annulled by the Catholic Church. N.T at 7. Hence, her marriage was not recognized by the Church as canonically valid. Father DiNardo testified that by its very nature, marriage is a public act within the Church and Ms. Wesley's marriage was, therefore, a public rejection of the official teachings and laws of the Church. N.T. at 7; App. at A10-A11.

Bishop Leonard is a pervasively religious school which is owned and operated by the Roman Catholic Diocese of Pittsburgh. The teaching of Catholic faith and doctrine is integral to its very existence. N.T. at 10. Teachers are the principal instruments by which these tenets of faith are transmitted. Father DiNardo testified that students are expected to be taught the Catholic faith not only by word but also by example and that all teachers are expected to act as role models for their students both in and out of class regardless of the particular subject taught.[1] N.T. at 10; App. at A12-A13. Ms. Wesley admitted that she was aware of the school's policy and was aware that her conduct violated that policy. N.T. at 14.

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1. Contrary to Ms. Wesley's assertions, Bishop Leonard has never conceded that she "satisfied the demands of her [teaching] position" or that her "marriage would not negatively affect her competency as a teacher." Petition at pp. 5 and 8. Rather, Bishop Leonard specifically argued that:

> "Catholic teachings on the sanctity of sacramental marriage and its indissolubility cannot be taken seriously by students when their teachers fail to follow those teachings. Thus, the actions of teachers outside of the classroom which are in conflict with the teachings they are expected to convey have great potential for undermining their effectiveness in the classroom." Reply Brief of Bishop Leonard in the Commonwealth Court at 6-7.

And the Commonwealth Court stated: "We agree that claimant's conduct directly reflected on her ability to perform her assigned duties and adversely affected the interest of Bishop Leonard." App. at A13-A14.

It was and is the position of Bishop Leonard that because Ms. Wesley had knowingly violated its reasonable work rule, she was ineligible for unemployment compensation benefits under traditional willful misconduct analysis applied in consonance with authoritative Pennsylvania court decisions. Conversely, Ms. Wesley presented evidence that she did not engage in conduct which would disqualify her from benefits under Pennsylvania's prevailing standards for determining whether she had been guilty of work-related willful misconduct.

The Office of Employment Security denied benefits on willful misconduct grounds. The Referee reversed that decision and entered an order allowing benefits because he felt that Bishop Leonard's rule was unreasonable. The Unemployment Compensation Board of Review affirmed the Referee's determination, though on other statutory grounds. Bishop Leonard appealed that decision to the Commonwealth Court.

Applying traditional willful misconduct analysis to the above facts, the Commonwealth Court, by a vote of 4-3, rejected Ms. Wesley's statutory arguments. Instead, it held that "Bishop Leonard had established the existence of a reasonable policy, that Claimant was aware of the policy and that her violation of [the] policy constituted willful misconduct." App. at A18-A19. Accordingly, the court held that Ms. Wesley was not entitled to benefits under the Pennsylvania unemployment compensation law.[2]

After making this determination, the court turned its attention to Ms. Wesley's Establishment Clause argument.[3] The court noted that Ms. Wesley had argued that a denial of benefits based on the violation of a

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2. Of course, the correctness of the authoritative construction of the Pennsylvania unemployment compensation law by the Pennsylvania courts is not before this Court.

3. As set forth in greater detail below, Ms. Wesley did not argue that her free exercise rights were violated.

religiously based work rule constituted an unconstitutional establishment of religion because, in her view, it "serves to advance the Catholic religion." App. at A19. The court rejected that argument, holding that the state's failure to award unemployment benefits to Ms. Wesley constituted a permissible accommodation of the religious liberty interests of Bishop Leonard; not an impermissible establishment of religion. App. at A22-A23.

Having determined that Ms. Wesley was ineligible for unemployment benefits under the state statute and that application of traditional willful misconduct analysis under the statute did not violate the Establishment Clause, the court did not reach the Free Exercise issue raised by Bishop Leonard.

Judge Smith dissented, stating her view that the denial of benefits based on traditional willful misconduct analysis violated the Establishment Clause. Judge Byers also dissented, stating that he did not believe that the state could deny benefits for willful misconduct based upon violation of a religiously based work rule. Judge Kelley dissented without opinion.

The Pennsylvania Supreme Court denied review without opinion.

SUMMARY OF ARGUMENT

Two questions are presented for review by petitioner, Ms. Wesley: one under the Establishment Clause; the other under the Free Exercise Clause. The latter question was not raised by Ms. Wesley in the state courts and those courts did not rule upon that issue. Accordingly, that question is not properly before this Court.

Ms. Wesley, nevertheless, suggests that review by this Court is necessary because the lower court's ruling "badly misinterprets and misapplies several decisions" of this Court regarding the free exercise rights of individuals in the context of entitlement to unemployment

benefits. Petition at 17-18. Only one of the cases cited by Ms. Wesley as having been "misapplied" or "misinterpreted" by the court, *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987), is even mentioned by the court below, and that case is not cited by the court for its Free Exercise Clause applications. Rather, it is cited by the court for its Establishment Clause principles. Thus, it can hardly be argued that review by this Court is warranted in order to rectify the lower court's decision on free exercise grounds—it made no such holding.

Ms. Wesley also contends that review by this Court is warranted because the lower court held that an award of unemployment benefits would impermissibly infringe upon the free exercise rights of Bishop Leonard. She asserts that such a holding "conflicts directly with the holding . . . of this Court in *U.S. v. Lee.*" Petition at 18. To the contrary, although Bishop Leonard had argued that an award of benefits would infringe upon its free exercise rights, the Commonwealth Court did not reach that issue. Instead, it held that benefits must be denied to Ms. Wesley due to the fact that she had engaged in willful misconduct under the statutory framework. The court's holding was based entirely on its construction of the Pennsylvania unemployment compensation law; not on any federally guaranteed free exercise right of Bishop Leonard. Thus, the lower court's holding in no way conflicts with this Court's decision in *Lee.*

Finally, as to Ms. Wesley's Establishment Clause claim, the lower court's decision is consistent with the prior decisions of this Court. Thus, none of the considerations governing review on writs of certiorari which are set forth in Rule 10 of this Court's rules are present in this case. Accordingly, the petition should be denied.

REASONS FOR DENYING REVIEW

I. PETITIONER DID NOT RAISE AND PRESERVE HER FREE EXERCISE CLAIM IN THE STATE COURTS, AND THAT QUESTION IS NOT PROPERLY BEFORE THIS COURT.

Ms. Wesley has presented two questions for review by this Court.[4] Question Number Two of the Petition for Certiorari requests that the Court decide whether a denial of unemployment benefits to Ms. Wesley impermissibly burdens her free exercise rights under the First Amendment to the United States Constitution. Ms. Wesley did not raise this issue before the state court and that court did not address the issue. Therefore, that question is not properly before this Court.

This Court has often stated that it "will not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). *See also, Exxon Corp. v. Eagerton*, 462 U.S. 176, 180-181 and n.3 (1983); *Rotary International v. Rotary Club*, 481 U.S. 537, 549-550 and n.9 (1987).

In *Cardinale*, after granting certiorari, it became apparent that the question before the Court "had never been raised, preserved, or passed upon in the state courts below," and the Court, accordingly, dismissed the writ for lack of jurisdiction. 394 U.S. at 438-39. In so doing, the Court stated:

> In addition to the question of jurisdiction arising under the statute controlling our power to review final judgments of state courts, 28 U.S.C. §1257, there are sound reasons for this. Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not

4. Question Number One involves the Establishment Clause and Bishop Leonard acknowledges that that issue was raised in and decided by the court below. It is addressed in Part II of this brief.

> compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground.

Id.[5]

Not only does this Court lack jurisdiction over Ms. Wesley's free exercise claim, the facts of this case make it particularly inappropriate for review. First, as set forth in Part B of this Section, the record is devoid of evidence which would support the claim. Second, because of Ms. Wesley's failure to raise the issue below, the Pennsylvania courts have been deprived of an opportunity to rule upon it. Review by this Court under these circumstances would violate important principles of federalism.[6]

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5. The Court appears to have a somewhat more flexible approach where it is asked to review issues which were not presented to or decided by lower federal courts. *See e.g., Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from the *federal courts* that questions not pressed or passed upon below are reviewed.") (emphasis added); *United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980); *Capitol Cities Cable Inc. v. Crisp*, 467 U.S. 691, 697-698 (1984). However, even in these cases, this Court only grants review where the record contains sufficient facts to enable the Court to resolve the issue and the question for the Court is purely legal.

6. It is clear that where a Free Exercise claim is raised, the Pennsylvania Commonwealth Court is more than willing to assure that the issue is properly addressed. In *Monroe v. UCBR*, 112 Pa. Commonwealth Ct. 488, 535 A.2d 1222 (1988), a claimant alleged that she had quit her job because she felt that her duties were in conflict with her religion and that a denial of unemployment benefits violated the First Amendment's Free Exercise Clause. The Commonwealth Court remanded the matter to the Board for further factual findings stating:

> Due to our inability to make factual findings and due to the Board's failure to make necessary findings on relevant issues, we are unable to determine, as a matter of law, whether or not

A. This Court Lacks Jurisdiction Over Ms. Wesley's Free Exercise Claim Because She Did Not Properly Raise That Issue in the State Courts.

In *Rotary International, ante,* this Court stated:

> It is well-settled that this Court will not review a final judgment of a state court unless 'the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system.'

481 U.S. at 550 *quoting, Webb v. Webb,* 451 U.S. 493, 496-497 (1981). In keeping with this requirement, Rule 14(h) of this Court's rules states that a party seeking review of a state court judgment must specify in the statement of the case, the stage in the proceedings, at each stage of review, where the federal questions sought to be reviewed were raised, the manner in which they were raised, and the way in which they were passed upon by the state courts. Rule 14(h) also requires that pertinent portions of the record where the federal question is addressed be specified.

Petitioner has failed utterly to comply with this requirement. She states that she "argued that her right to free exercise of her religious choices . . . would be

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NOTES *(Continued)*

> the claimant's actions were motivated by 'religious' reasons and thus within the ambit of First Amendment protection. We must, therefore, remand this matter to the Board for an evidentiary hearing and findings.
>
> On remand, the Board must first determine the beliefs that the claimant actually held and whether or not those beliefs were sincere, as well as religious (as opposed to secular) in nature. Findings are then necessary on the job requirements which the claimant believed to be in conflict with her religious beliefs. If the Board should determine that her beliefs were sincerely held and religious in nature, it must then determine whether or not there was an actual conflict between those *beliefs* and the employer's job requirements.

112 Pa. Commonwealth Ct. at 496-97, 1225 (emphasis in original).

penalized" by a denial of benefits. Petition at 11. However, she does not cite any portion of the record to support this claim. This is not surprising since it is impossible for her to do so.

One may search the record in vain to find any reference in the Commonwealth Court, expressly or by implication, to demonstrate that a federal free exercise claim was presented for review. Ms. Wesley presented three questions for review at the Commonwealth Court. Two dealt with the proper construction of the willful misconduct provision of the Pennsylvania statute. The third asked whether a denial of benefits would impermissibly constitute an "establishment of religion." Brief of Intervenor in Commonwealth Court at 1. At no point in the brief did Ms. Wesley cite to any federal case, let alone one of this Court's decisions in the area of Free Exercise.[7] Thus, it is plain why the Commonwealth Court "did not address Ms. Wesley's free exercise claims." Petition at 12. Petitioner never gave that court any indication that she wished to raise such a claim.

Ms. Wesley, in her subsequent petition for review by the Pennsylvania Supreme Court, did ask in one question whether the denial of benefits "unconstitutionally interferes with the petitioner's right to religious freedom." Petition for Allowance of Appeal to the Pennsylvania Supreme Court at 1. It should be noted that no specific reference to the United States Constitution was made in that question and that Ms. Wesley's arguments

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7. In *Rotary International*, this Court held that issues of vagueness and overbreadth were not adequately raised below even though the appellants had cited to a Supreme Court decision and quoted from it regarding the fact that vague and overbroad statutes tend to allow selective enforcement against unpopular causes. 481 U.S. 550, n.9. In so holding, the Court stated that a casual reference to a federal case "is insufficient to inform a state court that it has been presented with a [federal question]." *Id.* Here, Ms. Wesley did not even mention a federal case on point.

in her brief relied on the Pennsylvania Constitution.[8] Petition for Allowance of Appeal at 10-11.

The Pennsylvania Supreme Court denied review without opinion. App. at A1. This Court has often stated:

> [W]hen 'the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.'

Rotary International, 481 U.S. at 550, *quoting, Exxon Corp. v. Eagerton,* 462 U.S. at 181 n.3. Accordingly, it must be assumed that the Pennsylvania Supreme Court's failure to grant review and rule upon a free exercise claim was due to Ms. Wesley's failure to properly raise that issue in the Commonwealth Court and her failure to present it for review in its own court in any recognizable form.[9]

B. There Are No Facts in the Record Which Would Support a Free Exercise Claim by Petitioner.

Even if this Court had jurisdiction to decide Ms. Wesley's free exercise claim, it should decline to do so because there are no facts in the record upon which the question could be decided. Ms. Wesley appears to argue

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8. Ms. Wesley's sole reference to the Free Exercise Clause in her brief is contained in one sentence which simply states that the First Amendment "provides that 'Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof.' " Petition for Allowance of Appeal at 10.

9. Rule 302(a) of the Pennsylvania Rules of Appellate Procedure states: "Issues not raised in the lower court are waived and cannot be raised for the first time on appeal." Moreover, Rule 1115 requires that a party petitioning for review "append to the petition the verbatim texts of the pertinent provisions of constitutional provisions . . . which the case involves." Although Ms. Wesley's petition contained the necessary appendix, it did not set forth the First Amendment to the U. S. Constitution as a pertinent provision which the case involved. See Appendix "C" to Petition for Allowance of Appeal.

that this Court's decisions in *Sherbert v. Verner,* 374 U.S. 398 (1963), *Thomas v. Review Board,* 450 U.S. 707 (1981), *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) and *Frazee v. Employment Security Dept.*, 489 U.S. 829 (1989) are dispositive of her claim. Petition at 33-35.

However, this Court has repeatedly stated that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause." *Thomas,* 450 U.S. at 713; *Frazee,* 489 U.S. at 833. The Court has also stated that "[t]he determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task." *Thomas,* 450 U.S. at 714. And the Court has readily acknowledged the "difficulty of distinguishing between religious and secular convictions and in determining whether a professed belief is sincerely held." *Frazee,* 489 U.S. at 833. Accordingly, "[s]tates are clearly entitled to assure themselves that there is an ample predicate for invoking the Free Exercise Clause." *Id.*

Thus, this Court's decisions make it clear that it is necessary to make factual findings before a decision on free exercise grounds can be rendered. In each of this Court's unemployment compensation cases where it was held that a denial of benefits violated the free exercise rights of claimants, this Court was careful to note that specific factual findings had been made below regarding the particular religious belief held by the claimant, the sincerity of the claimant's beliefs and the existence of a conflict between that belief and her job requirements. Or, at least, the Court noted that the sincerity of the religious belief was not challenged.[10]

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10. *Sherbert v. Verner*, 374 U.S. at 399 and n. 1 ("No question has been raised concerning the sincerity of Appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible."); *Thomas v. Review Board*, 450 U.S. at 710-12 and accompanying notes ("The hearing referee found that Thomas' religious beliefs specifically

The record in this case is completely devoid of any evidence which would support a finding that Ms. Wesley's violation of her employer's work rule was due to sincerely held religious beliefs, rather than purely secular personal preferences. In her pleadings and papers filed at the administrative level and her testimony at the hearing, Ms. Wesley argued only that her conduct did not constitute "willful misconduct" within the meaning of the unemployment law and that she was, therefore, entitled to benefits. She did not argue that a denial of benefits would violate her religious beliefs, and there is no evidence whatsoever in the record regarding the actual beliefs allegedly held by Ms. Wesley, the sincerity of those beliefs, or the existence of a conflict between those beliefs and her job requirements.

Neither the hearing Referee nor the Board of Review made any finding with respect to these points. The findings made by each entity related only to issues relevant to traditional willful misconduct analysis—*i.e.*, the existence of an employer work rule or policy and whether that rule or policy was violated. Indeed, the only facts relevant to religious beliefs that appear in the record are: 1) that Ms. Wesley "considered herself [to be] a Catholic," N.T. at p. 13; and 2) that the teachings

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NOTES *(Continued)*

precluded him from producing or directly aiding in the manufacture of items used in warfare." The Board also found that "[t]he evidence of record indicates that claimant . . . left his employment voluntarily because his religious beliefs . . . would not allow him to continue to work producing arms . . ." and "the finding is not challenged in this Court."); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. at 138 and n.2 (Hobbie informed her employer that she "was to be baptized into the Seventh-day Adventist Church and that, for religious reasons, she would no longer be able to work on her Sabbath." "It is undisputed that appellant's conversion was bona fide and that her religious belief is sincerely held."); *Frazee v. Employment Security Dept.*, 489 U.S. at 833 ("[T]he Board of Review characterized Frazee's [refusal to work Sundays as based on his] 'religious convictions.' " "The courts below did not question his sincerity, and the State concedes it.")

of the Catholic Church specifically prohibit the conduct in which she engaged. N.T. at pp. 7-9.

The record demonstrates only that Ms. Wesley "just wanted to be married," N.T. at 13; not that any religious belief compelled her to marry without the benefit of an annulment. Apparently, she desired to go through with her marriage immediately, without waiting to determine whether an annulment[11] could be obtained or whether she could ultimately conform her conduct to Bishop Leonard's requirements. Her reasons for refusing to delay may have been due to the fact that she had sent out invitations and did not want to inconvenience her guests, or may have been due to any number of other possibilities which have not been explored. There is simply no way of telling, from the record in this case, what her reasons were and they cannot be presumed.

This Court has stated that membership in an organized religious denomination that has specific tenets forbidding conduct that is required by one's work, is not required to be shown in order to establish that one's religious beliefs are in conflict with job requirements. *Frazee*, 489 U.S. at 834. The Court, however, has noted

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11. It is not clear that formal annulment proceedings were ever initiated. Bishop Leonard was unaware of such filings and refused to stipulate to this. N.T. at 6. The sole evidence of record on this point consists of oral statements by Ms. Wesley and Fr. DiNardo. There are no documents which would demonstrate whether a proceeding was initiated or that a resolution had been reached. Ms. Wesley's sole testimony on this point was that Mr. Wesley's previous wife had "contacted him about the proceeding in an attempt to go through with the annulment" and that to her knowledge it had not been successful. N.T. at 11-12. On cross-examination, Ms. Wesley stated that she was not aware that her husband had ever received a written notice that any annulment which was purportedly pursued was denied. *Id.* Father DiNardo testified that if an annulment proceeding were initiated, both parties would receive written notice of the proceedings by the ecclesiastical tribunal and would also receive written notice upon the grant or denial of an annulment. *Id.* at 14. If the annulment petition were denied, the notice would also inform the parties of their right to appeal. *Id.* at 14-15.

that such membership "would simplify the problem of identifying sincerely held religious beliefs." *Id.* Quite the opposite is true here. Ms. Wesley claims to belong to the Catholic Church—a hierarchical religious denomination that has a specific tenet *forbidding* the conduct in which she engaged. Thus, any claim which she might make regarding her beliefs would be at odds with the teachings of her own church.

Where a member of an organized Church takes a position which is in conflict with that Church's doctrines, or disputes the authenticity of interpretations of those teachings by Church officials, this Court has consistently recognized, as binding, the official interpretation by the Church hierarchy. This Court's holding in *Thomas* is not to the contrary. There, the employee, a Jehovah's Witness, claimed to have a religious belief which was *consistent* with the teachings of his church, though some other members of that church felt that the work involved was not necessarily forbidden by the church's teachings.

The law is clear that religious bodies have the right to self-governance and that the civil authority may not intrude upon that right. More than a century ago, in language which it has often repeated, the Supreme Court said:

> The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. *It is of the essence of these religious unions,* and of their right to establish tribunals for the decisions of

> questions arising among themselves that those decisions should be binding in all cases of ecclesiastical cognizance, *subject only to such appeals as the organism itself provides for.*

Watson v. Jones, 80 U.S. (13 Wall.) 679, 728-729 (1872). (Emphasis added.) It is a matter of common observation that, in all religious associations, conflicts and tensions arise and claims are made that those in recognized authority have acted unfairly. However, it is equally true that:

> . . . it is of the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable by objective criteria. Constitutional concepts of due process, involving secular notions of 'fundamental fairness' or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance.

Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 714-715 (1976). And *see, Kedroff v. St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952).

While, in *Serbian* (and other cases) the Court has held the self-governance of religious associations to be protected by the Religion Clauses of the First Amendment, the view of even the dissenting justices in *Serbian* would likewise sustain the self-governance principle on the basis of contract. Justices Rehnquist and Stevens, in *Serbian*, quoted from *Gonzales v. Archbishop,* 280 U.S. 1, 16-17 (1929) as follows:

> 'In the absence of fraud, collusion, or arbitrariness, the decisions of the proper Church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, *because the parties in interest made them so by contract or otherwise.*'

Serbian, 426 U.S. at 729-730. (Emphasis in the original).

As noted by the Commonwealth Court, Ms. Wesley was employed by the Church on the condition that she refrain from publicly rejecting the Church's teachings. App. at A10-A12. Thus, even if Ms. Wesley had claimed to hold a differing view regarding the meaning of the Catholic Church's official teachings (which she did not seriously dispute), the civil authorities would have been bound by the Church's own interpretations.

II. THE COMMONWEALTH COURT'S DENIAL OF BENEFITS ON THE BASIS OF TRADITIONAL WILLFUL MISCONDUCT ANALYSIS IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT.

Ms. Wesley argues that by denying her unemployment benefits under the Pennsylvania statute, the State has violated the Establishment Clause. Her argument proceeds as follows. Traditional willful misconduct analysis requires an inquiry into whether an employer's work rule is reasonable and whether that rule has been actually violated. Whenever the rule in question is religiously based, the Courts and state agencies would be forced to examine religious doctrines and tenets to determine whether the employee violated a religious rule and whether the rule itself is reasonable. In Ms. Wesley's view, this determination necessarily results in the government favoring or endorsing one religion over another and also necessarily entangles the government excessively in religious questions.

Accordingly, Ms. Wesley argues that it is unconstitutional to apply traditional willful misconduct analysis to religious employers when an employee is discharged for violating a religiously based work rule. Instead, she argues that the state must ignore the religious character of the employer and treat that employer as it would any non-religious employer. Petition at 27.

Of course, since non-religious employers are prohibited by law from discriminating on the basis of religion, it would be *per se* unreasonable for a non-religious employer to attempt to impose a religiously based rule upon its employees. Under Ms. Wesley's suggested approach, then, the state would be required to treat religious employers as though they were completely non-religious and award benefits whenever an employee is discharged for violating a Church's religiously based work rule. Thus, every religiously based work rule lawfully imposed by a Church would be treated as *per se* unreasonable. A religious school would have to pay unemployment benefits even if it discharged a teacher for actively teaching heresy to its students.

The Commonwealth Court rejected Ms. Wesley's approach. The court, instead, applied traditional willful misconduct analysis and recognized, as binding, the interpretations of religious doctrine by the Church. The failure of the state to charge Bishop Leonard's accounts as a result of its exercise of Church discipline does not serve to advance a particular religion in violation of the Establishment Clause. Nor does the manner in which the court applied willful misconduct analysis excessively entangle the government in religion.

A. The Commonwealth Court's Decision Does Not Have the Primary Effect of Advancing a Particular Religion in Violation of the Establishment Clause.

Ms. Wesley claims that the denial of unemployment benefits violates the Establishment Clause because it serves to advance the Catholic religion by allowing the Catholic Church to impose its beliefs on its employees. To the contrary, no particular religious employer is being singled out for favorable treatment as a result of the lower court's recognition of the general right of hierarchical churches to interpret their own rules and discharge employees when they violate those rules. Under the lower court's decision, any religious employer, no

matter what sect or denomination, that imposes religious requirements based on its own doctrines on its employees would be exempt from paying unemployment benefits to an employee who knowingly violated those requirements. For example, a teacher in a Jewish school that required its teachers to abide by its religious teachings regarding consumption of pork or participation in religious ceremonies, would engage in disqualifying willful misconduct if he knowingly violated those rules. Likewise, a Mormon employer that required its teachers to observe that Church's standards in such matters as regular church attendance, tithing and abstinence from coffee, tea, alcohol and tobacco would not be required to pay unemployment benefits to an employee who knowingly violated those rules.

By accommodating the Free Exercise rights of such religious employers, the state does not, thereby, violate the Establishment Clause. In *Hobbie*, and in *Sherbert*, it had been argued that awarding benefits to an employee who was discharged because she refused to work on the Adventist Sabbath would violate the Establishment Clause because it would advance the Seventh-day Adventist religion. This Court rejected the Establishment Clause argument in each case. *Sherbert*, 374 U.S. at 409; *Hobbie*, 480 U.S. at 144-145. In *Hobbie,* the Court stated:

> This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.

Id. at 145.

Just as the state does not violate the Establishment Clause by accommodating the religious beliefs of employees under its unemployment compensation program, it does not violate that clause by accommodating the religious beliefs of an employer. As this Court stated in *Corporation of Presiding Bishop v. Amos*:

> Undoubtedly, religious organizations are better able to advance their purposes [under the law]. But religious groups have been better able to advance their purposes on account of many laws that have passed constitutional muster . . . A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that *government itself* has advanced religion through its own activities and influence.

483 U.S. 327, 336-37 (1987).

The failure of the state to tax Bishop Leonard's account because it has exercised its religious liberty constitutes a permissible accommodation of that entity's religious freedom (as the Commonwealth Court held), not an establishment of religion. Ms. Wesley apparently overlooks the fact that the benefits which would be paid to her would not ultimately be paid from state funds. Rather, Bishop Leonard's account would be charged on a dollar-for-dollar basis. Unlike for-profit employers, Bishop Leonard is not mandatorily required to contribute to the unemployment compensation fund as an insurance fund. Instead, Bishop Leonard participates on a reimbursement basis whereby it is billed by the Commonwealth only when benefits are legitimately paid out to qualified claimants.

B. Application of Traditional Willful Misconduct Analysis, With Proper Deference To Religious Freedom, Does Not Excessively Entangle the State in Religion in Violation of the Establishment Clause.

Under Pennsylvania law, the reasonableness of an employer's work rule cannot be "considered in a vacuum. It must be considered in relation to the *particular employees* and to the reasonable standards expected by a *particular employer*." *Woodson v. Unemployment Comp. Bd. of Review*, 461 Pa. 439, 443, 336 A.2d 867, 868

(1975) (emphasis added). In determining that Bishop Leonard's rule requiring that its teachers refrain from publicly rejecting the Catholic Church's teachings was reasonable, the Commonwealth Court took into consideration the religious nature of the employing school and the particular role of the teacher employed within that school.

Ms. Wesley argues, however, that to apply the statute in this manner impermissibly entangles the government in religion. She insists that in order to avoid such entanglement, the state must ignore the religious nature of Bishop Leonard and treat it as though it were a secular employer. Thus, because a secular employer could not lawfully require her to abide by the teachings of the Catholic Church, neither could Bishop Leonard.

Ms. Wesley claims that this approach will place the state in a position of neutrality toward religion. However, in actuality, her approach requires the state to treat religious employers less favorably than all non-religious employers. For example, in *Giglio v. UCBR*, the court held that an employee had engaged in willful misconduct when he knowingly violated a rule of the Pennsylvania Supreme Court which prohibited court appointed employees from engaging in political activities. 126 Pa. Commonwealth Ct. 471, 560 A.2d 271 (1989). The employee sought unemployment benefits upon his discharge arguing that his refusal to obey the rule was reasonable because the rule forced him to choose between resigning from his employment and exercising his right to engage in political activity. The Commonwealth Court refused to hold that he was entitled to unemployment benefits, noting that the Court could constitutionally require him to refrain from political activity. Although it may have been unreasonable for another employer to impose such a restriction on its employees, the rule was reasonable because of the particular nature of the judiciary and its need to maintain its impartiality and avoid the appearance of impropriety. As *Giglio* demonstrates, purely secular employers

such as the judiciary have the benefit of having their particular needs taken into consideration while religious employers, according to petitioner, cannot be accorded similar treatment.

This Court's decisions do not support Ms. Wesley's approach. In resolving intrachurch disputes, this Court has stated that "the First Amendment severely circumscribes the role that civil courts may play." *Presbyterian Church v. Mary Elizabeth Blue Hull Church*, 393 U.S. 440, 449 (1969). "[T]he Amendment requires that civil courts defer to the resolution of issues of religious doctrine or polity by the highest court of a hierarchical church organization." *Jones v. Wolf*, 443 U.S. 595, 602 (1979), citing *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 724-725 (1976); *Watson v. Jones*, 80 U.S. (13 Wall. 679, 733-734 (1872).

Ms. Wesley claims that by deferring to the Catholic Church's interpretations of what constitutes a public rejection of its doctrines and laws, the state would impermissibly establish religion. Petition at 21-24. The above cases indicate otherwise. Deference to the Church's interpretations of its own laws does not violate the Establishment Clause. Rather, it is constitutionally required precisely in order to avoid excessive entanglement of government in religious affairs.[12]

The Commonwealth Court rendered its decision in conformity with these principles. It applied generally prevailing principles of law regarding willful misconduct

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12. In making her arguments, Ms. Wesley relies heavily on the fact that Bishop Leonard voluntarily participates in the state unemployment compensation program. She even suggests that this fact makes any infringement on its religious liberties that would be caused by an award of benefits permissible. Petition at 27-29. It is thoroughly unreasonable to presume that Bishop Leonard would voluntarily participate in an unemployment compensation program in which its liberty to protect the integrity of its religious mission is denied by the lack of a meaningful "willful misconduct" disqualification precisely where it is needed most: to avoid financial penalties where Bishop Leonard seeks to enforce those work rules which lie at the heart of the enterprise.

determinations and it accepted the Church's determinations regarding the violation of its work rule insofar as such determinations involved Church doctrine, discipline and policy. Accordingly, the Commonwealth Court's decision does not conflict with the decisions of this Court.

CONCLUSION

For the foregoing reasons, respondent Bishop Leonard requests, that the Petition for Certiorari be denied.

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Respectfully submitted,
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